

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35296

DUSTIN CARL HOLM,	)	2009 Unpublished Opinion No. 510
	)	
Petitioner-Appellant,	)	Filed: June 23, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bingham County. Hon. Jon J. Shindurling, District Judge.

Order denying application for post-conviction relief, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

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WALTERS, Judge Pro Tem

This is an appeal from an order of the district court that denied an application for post-conviction relief after an evidentiary hearing. We affirm.

I.

BACKGROUND

Dustin Carl Holm was found guilty by a jury of second degree kidnapping, I.C. §§ 18-4501, 18-4503, and burglary, I.C. § 18-1401. He also was found to be a persistent violator. Holm was sentenced to a unified term of life imprisonment with twenty years determinate for kidnapping and to a concurrent unified life term with ten years determinate for burglary. His convictions and sentences were upheld by this Court on appeal in an unpublished opinion. *State v. Holm*, Docket No. 30030 (Mar. 3, 2005). Holm timely filed an application for post-conviction relief. He claimed ineffective assistance of counsel because his attorney failed to determine Holm's state of mind by a toxicology expert who allegedly might have been able to shed light on

Holm's lack of specific intent in the commission of the kidnapping and burglary due to Holm's ingestion of a controlled substance.

The district court provided Holm a notice of intent to dismiss. With regard to Holm's claim that counsel was ineffective for failing to obtain a toxicology expert, the district court found that:

Petitioner failed to allege any fact which would establish that toxicology was relevant to his case. He has not alleged any facts which would tend to establish that he was under the influence of any substance at any time relevant to his case. Nor has Petitioner alleged any facts which set forth the opinion of a toxicology expert upon which the Court could base a finding that the retention of a toxicology expert would have affected the outcome of Petitioner's case.

In response to the district court's notice of intent to dismiss, Holm filed an amended petition. In that pleading, Holm asserted that his trial counsel was ineffective for failing to call two witnesses, Paul Myers and Nicki Holm, to testify. He contended that they would have testified about Holm's use of drugs on January 3, 2003, which was the date of the alleged kidnapping and burglary offenses, and the effect that the drugs had on Holm and on his ability to form the intent to commit the charged crimes. Holm also claimed that his attorney should have had him testify that he had taken methamphetamine on January 3, 2003, but that he unknowingly had also taken GHB<sup>1</sup> and that he was confused and unable to focus his thoughts. Holm further alleged that he would have testified that he could not have formed the specific intent to commit the crimes of kidnapping and burglary because of the effect on him of the GHB. In support of the amended petition, Holm provided an affidavit stating that, at the time of his crimes, he was knowingly under the influence of "amphetamines and marijuana" and unknowingly under the influence of GHB.

The district court scheduled an evidentiary hearing on Holm's amended petition. At that hearing, Paul Myers testified that immediately prior to the events that led to Holm's arrest, Holm was getting high. Myers testified that Holm was using methamphetamine and GHB, and that Holm was the person who mixed those drugs before ingesting them. Holm also testified at the evidentiary hearing. He testified that he knowingly took methamphetamine and marijuana, but claimed that he did not know there was GHB in the methamphetamine and that he only found out about it later through conversations with Nicki Holm and Paul Myers.

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<sup>1</sup> In his brief on appeal, Holm represents that GHB is an intoxicant commonly known as "date rape drug."

At the conclusion of the hearing, the district court noted that there was no “objective testimony” to support Holm’s claim--only his own self-serving testimony that he was unaware of the GHB. The court further concluded that Idaho Code Section 18-116<sup>2</sup> foreclosed Holm’s argument because “if you voluntarily ingest substances which affect your ability to make decisions about what you do in a criminal way, you don’t get to use the effect of the drug or alcohol as a defense in the case.” The court also reasoned that because of the risk involved in disclosing Holm’s drug use, “there are reasonable tactical reasons that [defense counsel] would refuse to follow up on Mr. Holm’s demand that those things be made part of the trial.” Accordingly, the district court dismissed Holm’s amended petition. This appeal followed, with Holm asserting that the district court erred when it rejected Holm’s claims that he had received ineffective assistance of counsel.

## II.

### STANDARD OF REVIEW

As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). When appellate review of a district court’s denial of post-conviction relief follows an evidentiary hearing, rather than a summary dismissal, the evidence must be viewed most favorably to the trial court’s findings. *McKeeth v. State*, 140 Idaho 847, 849, 103 P.3d 460, 462 (2004); *State v. Mathews*, 133 Idaho 300, 304, 986 P.2d 323, 327 (1999). In such a case, an appellate court will not disturb the lower court’s factual findings unless they are clearly erroneous. I.R.C.P. 52(a). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73-74, 764 P.2d 439, 440-41 (Ct. App. 1988). While we exercise free

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<sup>2</sup> Idaho Code § 18-116 provides:

**Intoxication no excuse for crime** – A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected or otherwise ingested the substance causing the condition.

review of the district court's application of the relevant law to the facts, *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992), a long standing maxim of appellate procedure prevents this Court from substituting its opinion of a witness's credibility for that of the trier of fact since the trier of fact is in the unique position to personally observe the witnesses who testify. *Salazar v. Tilley*, 110 Idaho 584, 587, 716 P.2d 1356, 1359 (Ct. App. 1986); *Erhardt v. Leonard*, 104 Idaho 197, 201, 657 P.2d 494, 498 (Ct. App. 1983). For that reason the trier of fact's finding concerning whether or not the burden of proof is met is entitled to great weight on appeal. *Sanders v. State*, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990); *Erhardt*, 104 Idaho at 201, 657 P.2d at 498, citing *In Re Bogert*, 96 Idaho 522, 531 P.2d 1167 (1975). See also, *Larkin*, 115 Idaho at 73-74, 764 P.2d at 440-41.

To prevail on an ineffective assistance of counsel claim, the petitioner for post-conviction relief must show that the attorney's performance was deficient and that the applicant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Mathews*, 133 Idaho 300, 306, 906 P.2d 323, 329 (1999); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing the attorney's representation fell below an objective standard of reasonableness. *Gilpin-Grubb v. State*, 138 Idaho 76, 81, 57 P.3d 787, 792 (2002); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). The petitioner must overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" to establish that counsel's performance was "outside the wide range of professional competent assistance." *Claibourne v. Lewis*, 64 F.3d 1373, 1377 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 690). Tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

### III. DISCUSSION

Holm argues that the district court "missed the point" when it found that he was not entitled to use the intoxication defense. Holm's argument is premised on the assertion that although he voluntarily had ingested methamphetamine, he did not know that he was consuming GHB that was mixed in with the methamphetamine. However, that assertion was rejected by the

district court when the court chose to accept the testimony of Myers who, contrary to Holm's version, stated that Holm himself had mixed the substances that he later ingested. The court's determination is clearly supported by the record provided on this appeal and will not be disturbed. I.R.C.P. 52(a). Because Holm failed to establish that he did not know that it was an intoxicating substance that he had ingested before committing his crimes, he was not entitled to use the defense addressed in I.C. § 18-116.

The district court also concluded that there was no basis for Holm's claim of ineffective assistance relating to counsel's failure to follow up on Holm's demand that Holm's drug use be made a part of the trial. The court ruled:

If you bring that stuff up at trial, not only would that have a questionable purpose, but that in itself may be considered ineffective assistance of counsel. Because now the jury is being given information which may alarm them, which has nothing to do with their ability to make a decision on the actual facts which should be considered in this case. And you increase the risk that the jury's verdict is going to be upon prejudice or on prejudicial grounds, as opposed to a determination of the facts.

We agree with the district court's assessment. It is unquestionable that revealing Holm's drug use had the potential to inflame and prejudice the jury. Admitting to the jury that Holm was voluntarily using methamphetamine and marijuana shortly before he committed his crimes would at best be a risky trial maneuver. Additionally, because Myers testified that Holm was voluntarily using marijuana, methamphetamine and GHB, the only way Holm could have supported his claimed involuntary intoxication defense was to testify himself, waiving his Fifth Amendment right to remain silent in his criminal trial. Holm admitted that his attorney did not tell him he could not testify in his own behalf, but recommended that he not take the stand. Furthermore, Holm failed to present any evidence that suggested that defense counsel was not prepared. In light of conversations that Holm disclosed that he had with his attorney regarding *State v. Dragoman*, 130 Idaho 537, 944 P.2d 134 (Ct. App. 1997), it cannot be said that the attorney was unaware of the law as it relates to the use of an intoxication defense under I.C. § 18-116.

We agree with the conclusion of the district court that Holm failed to present any evidence to overcome the presumption that, under the circumstances, trial counsel's decision not to present a defense that was unquestionably inflammatory and potentially prejudicial, and that would have required Holm to testify, was anything other than a sound trial strategy.

Consequently, even if Holm were entitled to an intoxication defense despite I.C. § 18-116, he has failed to show error in the district court's determination that the decision not to assert that defense at trial was a tactical decision and therefore not a basis for claiming ineffective assistance of counsel. *Howard*, 126 Idaho at 233, 880 P.2d at 263.

#### **IV.**

#### **CONCLUSION**

The district court did not err in denying relief on Holm's application for post-conviction relief. The order of the district court is affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GRATTON **CONCUR.**